Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1999

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY,

Petitioner,

–v.–

DANUTA RYDUCHOWSKI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals erred in holding that because the respondent had established a *prima facie* case, the jury was free to reject the Port Authority's explanation for the pay differential in the absence of evidence controverting that explanation.

Whether the Court of Appeals erred in reinstating a jury verdict, finding that the Port Authority had not proven by a preponderance of the evidence that a differential in a merit increase was made pursuant to "a merit system", within the meaning of the Equal Pay Act of 1963, 29 U.S.C. §206(d) (1), based solely upon a minor discrepancy in the application of the "merit system" actually in the respondent's favor.

THE PARTIES

The parties are those listed in the caption of this petition.

TABLE OF CONTENTS

Page

Table of Authorities iii

Opinions Below v

Jurisdictional Statement for this Court v

Statutory Provision Involved vi

Statement 1

Reasons for Granting the Writ 7

A. There is a Conflict Between Two Circuit Courts of Appeal on the Proper Weight to be Accorded to the *Prima Facie* case under the Equal Pay Act 7

B. This Case Presents an Important Issue of Federal Law that Should Be Resolved by this Court, Namely, What Are the Proper Contours of the Merit System Defense under the Equal Pay Act 10

Conclusion 15

TABLE OF CONTENTS

Page

Appendix A:

Oral Decision of the United States District Court for the Eastern District of New York (Judge John Gleeson) Dated February 19, 1999 ..... A1

Judgment of the United States District Court for the Eastern District of New York Dated March 31, 1999 ..... A20

Appendix B:

Decision of the United States Court of Appeals for the Second Circuit Dated February 8, 2000 ..... A22

Order and Judgment of the United States Court of Appeals for the Second Circuit Dated February 8, 2000 ..... A42

TABLE OF AUTHORITIES

Page

Cases Cited:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 10 n.3

Brinkley v. Harbour Recreation Club, 180 F. 3d 598 (4th Cir. 1999) 8, 10 n.3

Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 10, 11

EEOC v. Aetna Ins. Co., 616 F. 2d 719 (4th Cir. 1980) 11, 13 n.6

Pullman – Standard v. Swint, 456 U.S. 273 (1982) 7

Strecker v. Grand Forks County Soc. Serv. Bd., 640 F.2d 96 (8th Cir. 1980) 7

Statutes Cited:

42 U.S. Stat. 174 (1921) 2

Fed. R. Civ. P. 50(b) 4

1921 N.J. Laws Ch. 151 2

1921 N.Y. Laws Ch. 154 2

N.Y. Unconsol. L. §§ 6401-23 (McKinney 1979) 2

TABLE OF AUTHORITIES

Page

Statutes Cited:

Equal Pay Act ..... *passim*

28 U.S.C. § 1254 (1) v

28 U.S.C. § 1331 v

29 U.S.C. § 206(d)(1) ..... vi, 10

Regulations Cited:

29 C.F.R. §800.144 (1979) 14 n.6

29 C.F.R. Part 1620 ..... 14 n.6

Other Materials Cited:

109 Cong. Rec. 9203, 9208 (1963) 14 n.6

OPINIONS BELOW

The opinion of the Court of Appeals (A22-41) is reported at 203 F.3d 135.

The opinion of the District Court (A1-19) is unreported. The prior decision of the District Court granting partial summary judgment to the Port Authority is reported at 78 Fair Empl Prac. Cases 1637; 1998 WL 812633 (EDNY 1998).

JURISDICTIONAL STATEMENT FOR THIS COURT

The opinion and order of the Court of Appeals was issued on February 8, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). Jurisdiction in the District Court was pursuant to 28 U.S.C. §1331.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §206(d)(1) provides:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal kill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee

No.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Port Authority of New York and New Jersey Hereby Petitions for a Writ of Certiorari to Review the Order of the United States Court of Appeals for the Second Circuit in this Case.

STATEMENT

Petitioner, The Port Authority of New York and New Jersey is a body corporate and politic, created in 1921 by a Congressionally-consented-to Compact between the States of New York and New Jersey to develop public transportation, terminal, and other facilities of commerce within the statutorily

defined Port District, 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws Ch. 151 and 1921 N.Y. Laws Ch. 154. The Compact is codified at N.Y. Unconsol. L. §§ 6401-23 (McKinney 1979).

At the present time, pursuant to the 1921 Compact and subsequent bi-State legislation, amendatory and supplementary thereto, the Port Authority owns and/or operates thirty-three (33) facilities within the statutorily defined Port District (A24).

In 1995, the Port Authority determined that it was necessary to reduce its work force to promote efficiency and economy within the agency. Accordingly, in September 1995, the Port Authority's Board of Commissioners adopted a resolution entitled "Reduction In Force – Severance Allowances for Separated Employees" pursuant to which the Port Authority implemented a reduction in force. The decision as to which employees would be selected for termination was primarily left up to the discretion of the department directors and their respective managers. Approximately 316 positions were eliminated from the Port Authority on September 15, 1995 including that of Respondent, Danuta Ryduchowski, as well as that of the comparator, Jeffrey Lopez.

At the beginning of September 1995, Respondent was employed by the Port Authority as a staff maintenance evaluation engineer (Level B-92) in the structural section of the Maintenance Management Evaluation Division ("MMED") of the Treasury Department. The structural section of MMED was responsible for performing maintenance evaluations of Port Authority structures to ensure that they were being properly maintained and making recommendations concerning improvements in existing maintenance programs.

In order to implement the reduction in force in September 1995, the Treasury Department was instructed to review the

programs of its divisions and determine whether any of the work performed was duplicative of that done by other departments. Following discussions with the Engineering Department and various line departments (i.e. the Aviation, World Trade, Ports, etc.), it was determined that the work done by the structural section of MMED was duplicative of that done by the Engineering and line departments. Accordingly, the Treasury Department decided to eliminate all positions in this unit.

At the time of the reduction in force, the structural section of MMED consisted of six positions – the supervisor, two senior engineers and three structural engineers. Due to retirements, three of the six positions were vacant at the time of the reduction in force. The supervisor of the section was Harry Woods, the senior engineer was the comparator, Jeffrey Lopez, and the structural engineer was respondent. As a result of the reduction in force, all positions in the structural section were eliminated except that of the supervisor. Both respondent and Mr. Lopez were involuntarily separated from the Port Authority (A24).

On November 28, 1995, respondent filed a charge of discrimination with the United States Equal Employment Opportunity Commission ("EEOC"). On or about November 14, 1996, the respondent commenced the instant action seeking, *inter alia,* damages for alleged gender and national origin discrimination in her termination and in the promotions of Harold Woods and Jeffrey Lopez, as well as for violations of the Equal Pay Act.

The Port Authority was granted partial summary judgment (A1,25), dismissing respondent's Title VII claims with respect to her termination and with respect to the promotion of Harold Woods.

Trial was held on the remaining claims, alleging violations of the Equal Pay Act (A2, 25) and for respondent's Title VII claim with respect to the promotion of Jeffrey Lopez. The jury returned a verdict in favor of the Port Authority with respect to respondent's Title VII claim with regard to the promotion of Jeffrey Lopez, but found that the Port Authority had not proven by a preponderance of the evidence that the 1994 and 1995 merit increase differentials between plaintiff and Lopez were based upon a valid merit system. The jury also found that the 1994 Equal Pay Act violation was not willful and, therefore, not actionable beyond the two-year statute of limitations (A3, 32)

The Port Authority moved, pursuant to Fed. R. Civ. P. 50(b) for judgment as a matter of law with respect to the verdict in respondent's favor regarding the alleged 1995 Equal Pay Act violation. The Port Authority's motion was granted in a decision issued by the District Court from the bench on February 19, 1999 (A1-19).

In granting the Port Authority judgment as a matter of law, the district court noted that there was no dispute that respondent had established her *prima facie* case – that respondent and Jeffrey Lopez had performed equal work under similar conditions (A6, 33, 36) and that Lopez had received an eight-tenths of one percent (0.8%) higher increase in 1995 (A6, 33, 36). The court specifically found that respondent had not disputed her ratings for those years and, indeed, had testified that she was satisfied with her evaluations "overall rating of competent and dependable level of performance" (A6-7).

In finding no Equal Pay Act violation as a matter of law, the district court relied on the fact that the comparator, "Lopez ... got higher performance ratings in each of the two years in question ..." (A6, 33). With respect to the differences in the

performance evaluations, the court stated, "[e]ven viewing the evidence, as I must, in the light most favorable to the plaintiff, the difference in the evaluation was plainly justified." (A7, 33). The difference was justified, the district court found, because of the change in responsibilities of the engineers in respondent's division to that of maintenance evaluation, a function which placed a greater emphasis on written and oral communication (A7, 33) and that "the essence of the criticism of [respondent's] work had to do with her ability to express herself in writing ..". Indeed, the court noted that respondent herself had testified that the criticism was justified (A8-9, 33).

The district court went on to evaluate the evidence regarding the Port Authority's merit system, which, it significantly noted, was "in essence undisputed" (A10). The court found that the evidence established that there was a written merit system applicable both to respondent and to Jeffrey Lopez, which provided that increases were to be based "primarily on performance with consideration also given to ... position in [the] salary range" and were not "automatic". (A10-12).

Even considering the testimony that in 1995 respondent's 3.6 percent increase was one tenth of one percent more than the 3 to 3.5 percent she should have received given respondent's place "above the middle of her salary range" (A11), the district court nevertheless concluded "that the only rational conclusion to be made on this evidence is that the very modest difference, point eight percent, between the merit increases of plaintiff and Lopez in 1995 were (sic) based on a valid merit system." (A13).

Significantly, the district court went on to explain that while it always had been open to respondent to attempt to rebut the business reason for the pay differential as a pretext, respondent had not sought to do so here. The jury was not so charged and

the respondent did not object to the charge or seek an additional charge based upon a theory of pretext (A13, 17, 33-34).

The United States Court of Appeals for the Second Circuit reversed the judgment of the district court and reinstated the jury verdict in favor of respondent on her 1995 Equal Pay Act claim (A41). Relying on what the Court of Appeals noted was sparse guidance from its sister circuits as to the "proper contours" of the merit system defense, the Second Circuit held that the burden of establishing one of the four affirmative defenses is a "heavy one" because the statutory exemptions are "narrowly construed". (A36).

The Second Circuit went on to find that the jury reasonably could have found that the Port Authority had not met its burden of "proving that it systematically administers the system" (A31), which the Court acknowledged was "detailed" and "facially adequate" (A41). First, that while the merit system policy provided that attendance and position in salary grade were factors to be considered in merit increases, there was no category in the yearly evaluation form for these two factors (A37-38). Second, the Port Authority failed to properly correlate merit increases to the employee's evaluation because respondent actually received a one-tenth of a percentage point (0.1 %) increase higher than the record established would have been warranted by her evaluation and position in pay grade. (A38). Third, that the jury could have found, based on that the evidence of gender prejudice in the record on the part of two of respondent's supervisors, that the evaluation process was manipulated by the supervisors so that it hadn't been systematically applied to respondent (A38).

Finally, despite the fact that respondent had neither presented any evidence controverting the validity of her yearly evaluations, nor the higher evaluations received by Jeffrey

Lopez, nor her supervisors' criticism of her written communications skills as pretextual, and the jury had made no such findings, the Second Circuit held that the jury was free to reject the Port Authority's explanation for the pay differential and find that the pay differential between her and Jeffrey Lopez was, in fact, based upon gender bias (A39).

REASONS FOR GRANTING THE WRIT

A. There is a Conflict Between Two Circuit Courts of Appeal on the Proper Weight to be Accorded to the *Prima Facie* case under the Equal Pay Act.

Adopting the holding of the Eighth Circuit in *Strecker v. Grand Forks County Soc. Serv. Bd.*, 640 F.2d 96, 99n. 1 (8th Cir. 1980), *implicitly overruled on other grounds by Pullman – Standard v. Swint,* 456 U.S. 273 (1982), that the Equal Pay Act "'creates a type of strict liability'" (A35), the Second Circuit held that since respondent had established her *prima facie* case, the jury was free to disbelieve the Port Authority's explanation that respondent's "subpar" written and oral communication skills accounted for her merit rating and the resulting lower merit increase (A39).

However, as the district court correctly noted, the Port Authority's explanation of her lower rating was never controverted in any way by respondent. In fact, respondent actually testified at trial, before the jury, that she agreed with her rating, as well as her supervisors' criticisms of her communications skills.[1] Nor did respondent even attempt, in

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[1] In this regard, the Second Circuit mischaracterized the Port Authority's argument, which was *not* that respondent had never complained to her supervisors about her rating (A39-40). In fact, as the district court noted, when respondent was dissatisfied with her evaluation, she did complain (A6-7). The

any way, to cast doubt upon the higher rating received by the comparator, Jeffrey Lopez (A7-10).

In the absence of any evidence controverting the correctness of those evaluations, the Port Authority respectfully submits that the jury was not free to reject the Port Authority's explanation for the merit increase differential. Regardless of the existence of a *prima facie* case, the jury's rejection of the Port Authority's evidence still would have had to have been rational.[2] It simply would not be rational to reject the Port Authority's explanation, in the absence of any evidence whatsoever controverting that explanation.

The Second Circuit's holding herein is in direct conflict with the reasoning of the Fourth Circuit in *Brinkley v. Harbour Recreation Club,* 180 F. 3d 598 (4th Cir. 1999), in upholding a grant of summary judgment dismissing, *inter alia*, an Equal Pay Act claim because the plaintiff, like the respondent in the instant matter, had not produced any evidence that she was paid less, or the comparator paid more, because of gender. In words equally applicable to the matter at bar, the Fourth Circuit most cogently explained:

> The dissent places too much emphasis upon the prima facie case under the Equal Pay Act. As a result, the dissent creates a schema under which all Equal Pay

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point is that respondent, at trial, never disputed the correctness of her evaluations in 1994 and 1995.

[2] Of course, the fact of the matter is that the jury never rejected the Port Authority's explanation as to the differing evaluations of respondent and the comparator. As the record plainly establishes, the jury's verdict was simply that Port Authority had failed to establish by a preponderance of the evidence the existence of the merit system (A3, 32).

Claims in which the prima facie case has been made out must proceed to trial. The dissent's first error is characterizing the prima facie case as 'creat[ing] a presumption of discrimination'. Post at 27. Actually, the Equal Pay Act's prima facie case is a traditional one—proof of the elements establishes a violation of the Act... Through the prima facie case, the plaintiff has demonstrated a pay differential—that an employer has paid members of the opposite sex different wages to perform jobs that require 'equal skill, effort, and responsibility, and which are performed under similar working conditions,' 29 U.S.C.A. § 206(d)(1) (West 1998). If the defendant does not justify the differential by proving one of the statutory affirmative defenses, the defendant loses the case.

Once the affirmative defenses are at issue, the focus of the inquiry shifts away from the existence of the pay differential (the prima facie case) toward seeking an explanation for why that pay differential has occurred. The dissent is simply incorrect in stating that the plaintiff's evidence underlying the prima facie case is necessarily sufficient to satisfy the plaintiff's burden of production, ... and create a genuine issue of material fact sufficient to preclude summary judgment in the defendant's favor on its affirmative defense. In some circumstances, the evidence underlying the prima facie case may still be relevant, but the pay differential at the heart of the prima facie case is already acknowledged in the structure of the affirmative defenses. *Thus, evidence that merely points to the existence of a pay differential does nothing to further the plaintiff's cause. To survive summary judgment, the plaintiff must produce evidence, direct or circumstantial, that controverts the defendant's evidence that a legitimate ground justifies*

the pay difference. (Emphasis supplied) (Citation omitted)

180 F.3d at 615 n. 13.[3] The Port Authority respectfully submits that what the Fourth Circuit counseled against in *Brinkley* is precisely what the Second Circuit would allow in the instant case, namely, permit a jury to reject an employer's non-gender based explanation, in the absence of any evidence whatsoever controverting that explanation, on the basis of the mere existence of a *prima facie* case.

For this reason, the instant matter creates a conflict between the Second and Fourth Circuits, as to the proper weight to be accorded the prima facie case under the Equal Pay Act, requiring resolution by this Court.

B. This Case Presents an Important Issue of Federal Law that Should Be Resolved by this Court, Namely, What Are the Proper Contours of the Merit System Defense under the Equal Pay Act.

In *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974), this Court described the structure of the Equal Pay Act, 29 U.S.C. §206 (d) (1), noting that the provision's "basic structure and operation are... straightforward", a plaintiff bearing the burden of establishing that "an employer pays different wages to employees of opposite sexes 'for equal

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[3] *Brinkley* concerned the grant of a motion for summary judgment. However, as the district court correctly recognized in the instant case, the standards for a pre-trial summary judgment motion and those for the post-trial rule 50(b) motion for judgment as a matter of law, that is involved herein, are the same (A3-4). See also, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'"

This Court went on to explain that the act contains four exceptions, including the exception at issue in the instant matter, "a merit system". With respect to the exceptions, this Court held that once a plaintiff has met the burden of demonstrating unequal pay for equal work, "the burden shifts to the employer to show that the differential is justified under one of the Acts four exceptions." *Id.* at 196.[4]

Since the decision in *Corning Glass Works, supra,* this Court has not had the opportunity to rule on what suffices to meet the employer's burden of establishing a pay differential based upon the "merit system" under the act. The circuit court decisions which have dealt with the issue, for the most part, have focused on the existence of objective criteria for evaluations within a merit system.

Here, the Second Circuit correctly noted that "a 'merit system must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria'", citing, *inter alia, EEOC v. Aetna Ins. Co.,* 616 F. 2d 719, 725 (4th Cir. 1980) (A35-36). Nevertheless, in the face of substantial evidence in the record, both written and oral, of precisely such "an organized and structured procedure", evidence that the district court below had correctly characterized as "in essence undisputed" (A10),

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[4] For purposes of this petition, the Port Authority does not take issue with the Second Circuit's characterization of its burden in this case as "heavy" (A36). Whether or not "heavy" is an appropriate description, the Port Authority acknowledges that it is well-settled that it bore the burden of proof as to the existence of the merit system.

and the Second Circuit acknowledged to be "facially adequate" (A41), the Court of Appeals reinstated the verdict, holding that the jury could have found that the Port Authority had failed to establish the merit system defense, essentially because "[t]he jury could have... concluded that the Port Authority failed to properly correlate merit increases to an employee's evaluation." (A38). The Second Circuit's holding was based upon evidence of a slight, one-tenth of one percent (0.1%) discrepancy in the merit increase awarded to respondent, actually in her favor, in 1995.[5]

The Port Authority respectfully submits that the Second Circuit's reinstatement of the jury verdict on this basis is erroneous. The Court of Appeals action also is demonstrably egregious given the fact that some presumptive failure to properly correlate evaluations to increases is completely immaterial to the gravamen of respondent's EPA claim, to wit: that the comparator received a higher evaluation and therefore a higher merit increase in 1995 because of gender discrimination. The Second Circuit's decision thus allows the Port Authority to be held liable under the act, irrespective of the actual existence of gender discrimination in respondent's 1995

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[5] The Court of Appeals also chided the Port Authority for not producing a chart containing the correlations between the ratings and percentage merit increases (A38). As the district court correctly noted, however, a Port Authority witness testified to that correlation as it related to respondent's claims, in testimony that the district court found to be "in essence undisputed" (A10). Significantly, respondent never sought the introduction of any such chart. Thus, the Port Authority respectfully submits that any failure to produce the chart cannot be found to create a negative inference, much less to be a basis for a finding that the Port Authority failed to meet its burden of proof, as the Second Circuit wrongfully seems to imply.

merit increase, merely for proving a less than mathematically precise merit system. While such a result may be appropriate where there is pervasive gender discrimination in an employer's salary structure, the Port Authority respectfully submits that it is inappropriate, under the circumstance of the instant case, where the gravamen of the Equal Pay Act claim is a specific pay differential.

Moreover, in sustaining liability under the Equal Pay Act on such a minor, immaterial, discrepancy in the application of merit system to respondent, the Port Authority respectfully submits that the decision of the Court of Appeals turns the requirement of proving a valid or *bona fide* merit system into one of proving a perfect or mistake-proof system, a rigid system drawn to mathematical perfection and admitting of no discretion whatsoever on the part of employers. The Second Circuit's decision, thus, turns the merit system defense into a requirement resembling a civil service-type step and grade system. Neither this Court nor any of the other circuit courts has ever so held and the Port Authority respectfully submits that there is no reason to believe that mandating such a rigid system was the intention of Congress when it prohibited gender discrimination in pay on the part of employers.

The Port Authority acknowledges that the Second Circuit offered two other possible bases for the jury's verdict. However, these possible bases are easily dispensed with. First, since there was never any issue raised by respondent that either her attendance or her position in pay grade was wrongfully excluded from consideration in determining her 1995 merit increase, there is simply no basis to hold that the jury could have rendered its verdict because of any absence of categories for those factors in the yearly evaluation form.[6]

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[6] In any event, it is well settled that "[a] merit system, to be recognized as valid, need not be in writing." *Aetna, supra* at

Second, the Second Circuit's speculation that the jury could have believed that respondent's superiors "manipulated the evaluation process" and "thereby prevented the merit system from being systematically applied" to respondent (A38), is similarly without basis in the record. The fact is that the jury specifically rejected respondent's claims of any such gender-based discrimination in rendering its verdict in the Port Authority's favor on respondent's Title VII claim regarding the promotion of the comparator, Jeffrey Lopez. Even more significantly, where the issue was germane, the jury found that the Port Authority's violation of Equal Pay Act in 1994, in fact, not to be the result of any intentional discrimination directed at respondent (A3, 32).

Furthermore, the Port Authority respectfully submits that any question of a discriminatory failure to apply the merit system to respondent does not go to proof of the existence of the merit system itself; but, more properly, to a plaintiff's burden of establishing the employer's proffer of the merit system as explanation for the pay differential to be pretextual. Here, the district court correctly found, respondent chose not even to attempt to make a claim of pretext in the instant matter (A13, 17, 33-34).

Accordingly, the case presents the issue of whether a single *de minimis* discrepancy in the application of a merit system, specifically in correlating the amount of the increase to a complainants' evaluation and position in pay grade, actually in

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725, citing 29 C.F.R. §800.144 (1979); 109 Cong. Rec. 9203, 9208 (1963). That particular regulation no longer exists. The successor regulations, appearing at 29 C.F.R. Part 1620, promulgated upon the responsibility for the enforcement of the Equal Pay Act being transferred to the EEOC, do not change this rule.

a complainant's favor, which is immaterial to the substance of complainant's Equal Pay Act claim, is, in and of itself, sufficient to invalidate a merit system defense and impose liability upon an employer under the Equal Pay Act.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Granted.

Dated: New York, New York
May 5, 2000

Respectfully submitted,

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APPENDIX A

Oral Decision of the United States District Court for the Eastern District of New York (Judge John Gleeson) Dated February 19, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RYDUCKOWSKI,

Plaintiff, CV 96 5589

- against -

PORT AUTHORITY of NEW YORK and NEW JERSEY,

Defendant.

THE COURT: I was inclined to write on this but I am not going to do that. I am going to give you an oral decision now. I will ask your indulgence. Bear with me while I read from my notes.

I have struggled with this motion. I struggled with the application to keep this issue from the jury, and I will never know this trial record any better than I do now. So, I don't see any reason not to, but for the potential clumsiness of my decision, not to render it now.

Ms. Ryduckowski had originally alleged discrimination in employment on the basis of national origin and sex. She also alleged violations of the Equal Pay Act. Claims were dismissed by memorandum of November 19, 1998, a memorandum order which granted in part and denied in part the Port Authority's motion for summary judgment. I am assuming familiarity with that November 19, 1998 memorandum order in rendering my decision here.

We went to trial on the remaining claims on November 30th, December 1st, and December 2nd, 1998. There were three claims that were tried: A Title Seven claim based on alleged unlawful failure to promote Ms. Ryduckowski from 1995. This claim challenged the promotion of Jeffrey Lopez, rather than the plaintiff, to the position of senior engineer in June of 1995. The plaintiff alleged that her sex and national origin were both motivating factors in that adverse employment decision.

Counts Two and Three we tried were Equal Pay Act Claims relating to merit increases given in 1994 and 1995, respectively. Specifically, in July of 1994 this is evidenced in Exhibit 18 the plaintiff was given a merit increase of 3.5 percent, whereas earlier that year, in April 1994, as evidenced in Exhibit 36, Lopez was given a merit increase of 4.7 percent, a difference of 1.2 percent over that of plaintiff.

I will leave out whether the exhibits are plaintiff's or defendant's -- there was some confusion at trial. It turns out they are essentially all joint exhibits.

The third claim was what I will refer to as the 1995 merit increase claim. In July 1995 the plaintiff received a 3.6 percent merit increase, Exhibit 18. In February of the same year Lopez received a 4.4 percent increase, that is Exhibit 37. Now, when I have denied, as I have mentioned already, the motion for judgment as a matter of law at the conclusion of the evidence, I thought the evidence and all claims at that point was extremely thin. I thought it was a good motion but as I said at the time, I was aware of the practice recommended by the 2d. Circuit, which is a preference in close cases involving the sufficiency of evidence in civil cases, to obtain a jury verdict so that in the event the judge's decision on the motion for judgment as a matter of law is

erroneous, the case doesn't need to be remanded for a retrial, rather the jury verdict could simply be reinstated.

That preference is set forth in Konik v. Plain Valley Physicians, 733 F.2d 1007 at 1013 footnote 4.

Cert. was denied in that case at 4069 U.S. 884.

The jury found for the defendant on a Title Seven claim. On the first Equal Pay Act claim, which is the 1994 claim, it found for the plaintiff on the affirmative defense, that is, it found that the Port Authority failed to prove by preponderance of the evidence that the lower increase given to plaintiff as compared to that of Lopez was based on a valid merit system.

However, the jury found for the defendant on the question of willfulness, that is, the jury found that the plaintiff failed to prove that equal pay violation was willful. Because that 1994 merit increase occurred outside the two-year statute of limitation applicable to the Equal Pay Act, the jury's decision that willfulness was not shown turned out to be fatal to the plaintiff's-claim. I address this issue in footnote 5 of my November 1998 order. On the 1995 claim, the jury's verdicts were for the plaintiff.

Now, the motion before me now is to set aside that verdict. I am aware of the deferential standard that has to be applied whenever a judge is asked to set aside a jury's verdict. Rule 50 of the Federal Rules of Civil Procedure says that if a jury returns a verdict for which there is no legally sufficient evidentiary basis, the court may either order a new trial or direct the entry of judgment as a matter of law. I have paraphrased the essence of Subsection B Rule 50. The same standard that applies to a pretrial motion for summary judgment pursuant Fed. R. Civ. 56 also applies to motions for

judgment as a matter of law during or after trial pursuant to Rule 50, the 2d. Circuit so said in This Is Me, Inc. v. Taylor, et al., 157 F.3d 139, 142 (2d. Cir. 1998) quoting Piesco v. Koch, 12 F. 3d. 332, 341 (2d Circuit 1993) of versus copy, 12 F.3d 332, F. 341 1989 three case, also from the 2d. Circuit.

In considering the Rule 50 motion, as I mentioned already, I must accord a jury verdict great deference. It is not my job simply to substitute my own judgment on the facts of the jury. I can't grant a motion for judgment as a matter of law, unless the evidence is such that without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable persons could have reached.

Authority for that standards is found, among other places, in Cruz v. Local Union No. 3, International Brotherhood of Electrical Workers, 34 F.3d 1148, 1154-55 (2d Circuit 1994). Quoting Simblest v. Maynard, 427 F.2d I, 4 (2d Circuit 1970): "Weakness of the evidence does not justify judgment as a matter of law; as when granting summary judgment the evidence must be such that "a reasonable juror would have been compelled to accept the view of the moving party." Thus, the court may disturb the jury's findings only if there is either a complete lack of evidence to support them or if the evidence is so overwhelmingly supportive of the movant that allowing the jury verdict to stand would be patently unfair.

Under the Equal Pay Act, which is the claim on which the plaintiff has prevailed, an employer violates the statute when it pays wages to an employee at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions. I have roughly

quoted Section 206(d), Title 29 United States Code, Equal Pay Act.

To make out a prima facie case, the plaintiff must demonstrate at that the employer paid different wages to employees of the opposite sex; second, that those employees performed equal work on jobs requiring equal skill, effort and responsibility; and third, the employees performed their jobs under equal working conditions. See Tomka v. Seiler Corp., 66 10 F.3d 1295 versus at 1310. It is a 1995 decision from our circuit.

The plaintiff does not need to prove that the employer intended to discriminate against her in order to prevail on her claim.

Once a plaintiff establishes a prima facie case, the burden of persuasion shifts to the employer to prove that the disparity in pay is justified by a valid merit system. There are other affirmative defenses set forth in the statute and in case law. The merit system is the one that was asserted here. An employer who attempts to justify a pay differential based upon a factor other than gender -- again, here that factor is a merit system -- must prove that it adopted the gender-neutral merit system for legitimate business purpose. Authority for that is found in Tomka 66 F.3d at page 1310; and Aldrich v. Randolph Cent. Sch. Dist., 963 F. 2d 520, 526-27 and N.l (2d. Cir.), that is a 2d. Circuit decision decided in 1992. In that same year cert. was denied. 506 United States 965 (1992).

If the employer satisfies its burden of justifying the wage differential with legitimate business reasons, the plaintiff can rebut the employer's explanation by demonstrating that business reason is merely a pretext, so says the Southern

District of New York Christiana v. Metropolitan Life Ins., Co., 839 F. Supp. 248, 252-53. It is a 1993 decision.

The light most favorable to the plaintiff, the evidence relating to her Equal Pay Act claim is as follows. I am going to leave out the evidence regarding the prima facie case.

There really was little question at this trial and there is no question here about the sufficiency of the evidence that demonstrated that during 1994 and 1995 plaintiff and Lopez performed equal work under similar conditions, so I will leave out the evidence relating to the prima facie case. It really is not in dispute at this point, nor could it reasonably be.

Lopez got a higher merit increase in both of the two years. In 1994 his merit increase was 1.2 percent higher than that given later in the year to the plaintiff. The differential in 1995 was even slighter. It was a point eight percent difference in the merit increases accorded to Lopez and the plaintiff.

In each of the years in question -- in each of the years in which they were employed by the Port Authority, for that matter, plaintiff and Lopez received performance evaluations and in each of those years the plaintiff's evaluation produced an overall rating of competent and dependable level of performance. That is the rating that is third from the top of six possible ratings given by the Port Authority. The ratings for the years at issue for the plaintiff are set forth in Exhibits 7 through 12.

There is a glitch that hardly matters with regard to the Equal Pay Act claim. There was a glitch with regard to the rating given to her in 1991 that had been down graded one box to the fourth box out of six by Thomas Buttling, but the

plaintiff promptly complained to Robert Rao, Buttling's supervisor and just as promptly that evaluation for that year was returned to the competent and dependable level of performance, so that the total evaluation in the third box out of six was the evaluation plaintiff received throughout.

There was no dispute by the plaintiff about these overall ratings except, of course, the successful dispute that I have already mentioned in 1991. The evidence at trial establishes that she was satisfied with her overall rating. For example, see pages 139 and 140, also at page 156 the plaintiff testified "I was, like, satisfied because they were always competent and dependable level of performance."

The testimony at page 284 -- this is not the plaintiff's testimony, it is the defendant's witness -- talks about how she never complained again about her overall performance evaluation after 1991 performance review.

Lopez for his part got higher performance ratings in each of the two years in question and this is evidenced in Exhibits 34 and 21 for the years 1993, 1994 and 1995 respectively. He received the overall evaluation of performance. "Performance exceeds most position requirements," that is box two out of six, so that is one level on the overall evaluation higher than the plaintiff.

Even viewing the evidence, as I must, in the light most favorable to the plaintiff, the difference in the evaluation was plainly justified. The evidence established that in 1990 the section of engineers to which the plaintiff was assigned, which was headed by Mr. Rao, had its responsibilities changed. The most significant aspect of the change in responsibilities was that the engineers, including Ms. Ryduckowski, stopped doing plan reviews and final inspections of the construction and reconstruction projects of

the Port Authority. They stopped doing the sort of design engineering and final inspections that engineers like Ms. Ryduckowski performed. It was preferred, sought after work. Mr. Rao fought on behalf of the engineers under his supervision to keep it but was overriden by the engineering department, which was jealous of the fact that this work, inspecting the plants and doing the final inspections to the projects, had been given to Mr. Rao's unit. Mr. Rao unsuccessfully sought to keep that work and the principal change in the work of the engineers under his supervision was that they began doing maintenance evaluations, they began doing projects that required greater emphasis, that entailed a greater emphasis on written and oral communication skills.

The importance of those skills is set forth in Rae's testimony at 184 to 188. The plaintiff's testimony on this subject is perfunctory but she does acknowledge at page 150 the fact that the plan review and final inspection work that she liked and preferred was stripped from her and other engineers in her unit as a result of this 1990 administrative decision by the Port Authority. The greater emphasis on the plaintiff's -- and on all the engineers in her section, for that matter -- writing skills and oral communication skills accounted in great part for her evaluation, for the overall evaluations. The essence of the criticism -- and let me hasten to add, that no one questioned the engineering ability of Ms. Ryduckowski, both as a matter of professional competence and as a matter of her practice at Port Authority, her engineering skills were beyond reproach -- the essence of the criticism of her work had to do with her ability to express herself in writing and to a lesser extent, orally.

The plaintiff herself acknowledged that her writing skills required improvement. She acknowledged in her own testimony the legitimacy of these criticisms that influenced

her overall evaluation. At pages 65 and 66 of the trial transcript she acknowledged that Woods' comments about her writing were warranted.

At page 107 she testified that she knew her writing skills needed improvement. She testified, and this came both from her and from other witnesses, that she volunteered to take seminar courses offered by the Port Authority to improve her writing skills. See, for example, the testimony at pages 236 and 237.

I don't want to overstate the point, but I think it is useful to point out the cross examination by Mr. Bello himself on this subject at page 301, the cross-examination of Buttling:

Question: You also testified that the main complaint or chief complaint about Ms. Ryduckowski was her writing skills?

Answer: Right.

Question: And I would assume that you would agree that they weren't all that understandable?

Answer: Correct.

So there is really no dispute that Ms. Ryduckowski, whose personal story is one that inspires only admiration, had significant room for improvement in her writing skills and to a lesser extent, I should add, Mr. Rao testified that to a lesser extent oral communication skills were of paramount importance once his engineers began performing their auditing and evaluation functions because, as Mr. Rao put it, no one liked the work of these auditors. Their work was to go in and criticize, to do maintenance evaluation and the

inability to articulate with precision could give the folks who were being criticized reason to deflect, diffuse, the criticism.

If, for example, a deficiency in the maintenance work were with regard to the placement of particular equipment and in the report itself the placement of that equipment was misdescribed, then the objects of evaluation might seek to undermine all of the engineer's conclusions simply because one of them had been expressed poorly.

Rao also mentioned that the ability to express one's self orally on the site of the evaluation was extremely important to the evaluation function, and although it is clear that Ms. Ryduckowski was a capable engineer and has an admirable personal history, it was equally clear from her testimony, which was difficult to follow, that her oral communication skills were not what they could be, and she testified her written communication skills were also validly criticized.

Now, in my charge to the jury I summarized the standard to which the affirmative defense -- that there was a valid merit system -- had to be subjected by it. I will summarize that here briefly.

The charge is at page, the essence of this part of the charge is pages 422 and 423 of the record. I told the jury the defendant must prove that the merit system accounted for the differential in the merit increase received by plaintiff as compared to Lopez. I told the jury that a valid merit system must reward persons who demonstrate better performance and also, that the difference can't be too great to be accounted for by the merit system that rewards performance.

Now, here is the evidence with regard to the merit system. Except to the extent I will mention in a moment, it is in essence undisputed. There was a written merit increase

system in place for the employees in the category in which the plaintiff and Lopez found themselves, and that is evidenced in defendant's Exhibit 17.

I will read from the first paragraph of it.

"Merit increases should be based primarily on performance with consideration also given to the employee position in his/her salary range and attendance record. These increases are not automatic and all directors should review the job performance attendance report and the present salary of each staff member to determine if the employee's contribution warrants an increase."

I don't mean to isolate that, but insofar as it relates to this case, that strikes me as the most pertinent part of the policy set forth in defendant's Exhibit 17.

At page 333 Mr. Chanfrau testified that the average merit increase in 1994 was 3.5 percent. He also noted, and this is evidenced elsewhere in the record, that plaintiff received from the defendant a 3.5 percent merit increase in that year. On the same page, Mr. Chanfrau testified that whereas the plaintiff received 3.6 increase in 1995, the average merit increase that year was 3.2 percent.

Now, Chanfrau also gave testimony with regard to the other parameter that the supervisors are instructed to consider in defendant's Exhibit 17 in determining a merit increase, and that is where within her salary range the employee can be found. It turns out, as Mr. Chanfrau testified, that the plaintiff was above the middle of her salary range in both of these two years.

Now, at page 337 Chanfrau testified based on the performance rating that the merit increase given to the

defendant was higher than it should have been. On cross examination he testified -- and this is at pages 338 and 339 -- that the range that the plaintiff should have been granted a merit increase within is 3 to 3.5 percent.

Now, the attack at trial on Chanfrau's testimony was in the main based on -- 1 don't mean to exclude the rest of Mr. Belle's able cross-examination, but Mr. Belle pointed out that in the years 1992, 1993 when plaintiff had the same evaluation she, nonetheless, received a four percent merit increase. The import of that part of the cross examination was that it would have been appropriate for her to receive up to a four percent increase in 1994 and 1995.

However, at page 349 Chanfrau testified that the amount of money available to the supervisors in 1993 might have been higher, and that four percent may well have been the average merit increase in 1993 for that matter.

Now, before the case was presented to the jury this issue was argued and Mr. Belle asserted to me that the crucial issue -- this is at page 355 of the transcript -- the crucial issue in the case is whether or not Chanfrau credibly testified that the 1994 to 1995 merit increase could not have been higher, that is to say, that the 3.6 percent increase that she received couldn't have been higher. That I conclude, is really a fundamental flawed argument. It is not a crucial issue at all whether she could have received a higher merit increase in 1995. The issue is not whether she could have gotten a higher one, but whether the one she got was decided upon pursuant to a valid merit system.

Even if that were crucial, as Mr. Belle suggested, there is nothing in the record on which to base a conclusion that Mr. Chanfrau did not credibly testify that the plaintiff should not

have gotten more than a 3.5 percent increase in 1995 based on her performance evaluation.

As I mentioned, that was the argument made to me in an effort to fend off a pre-verdict Rule 50 motion and was also the argument on summation. At page 385 Mr. Bello argues to the jury there was no document to show the size of the pot. He also said -- in my judgment this is telling -- he also said, "I assume that if there is enough money in the division everyone could get higher increases." That assumption is not enough. I conclude that the only rational conclusion to be made on this evidence is that the very modest difference, point eight percent, between the merit increases of plaintiff and Lopez in 1995 were based on a valid merit system.

Now, the case was tried on the issue of whether the Port Authority satisfied its burden of justifying the different merit increases by reference to a legitimate business reason, based on a merit system. That is how it was tried. That is how it was presented to the jury.

The plaintiff can rebut that explanation by demonstrating that the business reason is merely a pretext. Now, the jury was not so charged. There was no objection to that aspect of the charge. As I mentioned, the case was tried on whether or not the employer the Port Authority had adduced sufficient evidence to support its assertion that there was a legitimate justification. That is how the case was tried to the jury. The plaintiff did not seek an additional charge based on the aspect of the law I have just described, which is pretext. If she had I would, nevertheless, conclude that the evidence would not warrant a rational fact finder in concluding that this valid merit system was merely a pretext for unlawful discrimination.

Let me briefly summarize the testimony at trial. The testimony at trial was not precisely what was expected by the plaintiff when the summary judgment motion was made. And had I had the benefit of the actual testimony, the decision of summary judgment may well have been different. The testimony with regard to Woods in 1991, and again I am assuming familiarity with my November decision so I am not going to restate the background of these allegations, in essence the plaintiff alleged that Woods sought a personal relationship with the plaintiff and then essentially upon being rebuffed, retaliated.

Again, the testimony at trial on this issue on Woods' alleged personal interest was a complete non-starter. The sum total of the evidence on this subject is a statement made by Woods in 1991 at Teterboro Airport in the course of an evaluation he was conducting there with the plaintiff. Woods denies this, but that doesn't matter. This is a motion to set aside a verdict, and I take as truth plaintiff's allegations. Specifically, plaintiff said that Woods said that the time we spend together are the happiest moments in his life -- Woods' life. Now, as plaintiff testified on pages 56 and 57, she ignored that comment but as she put it she, "realized maybe our relationship is turning toward a different level." It wasn't. Her own testimony established that it wasn't. She testified on cross examination that Woods never socialized with her, never asked her to socialize with him, never asked her out, never tried to touch her or engage in any inappropriate contact. That was it. That one statement by him is the sum total, the 1991 statement by him is the sum total of the alleged harassment by him, and the testimony simply doesn't support a rational conclusion that it was harassment.

Now, there was additional testimony that was proffered prior to trial, including as of the very morning the trial began, about statements that Woods made to her about going to Go-

go bars. That obviously fell by the wayside. It was not included in the plaintiff's testimony.

Mr. Belle candidly admitted it was not because he forgot to elicit it. It was plainly, according to the plaintiff herself, simply not said by Woods to her. The rest of the plaintiff's testimony on the subject centers almost exclusively on Woods' use of a red pen after the Teterboro incident to edit her work. Specifically, she mentioned on page 64 he then began to use a red pen. She said during that portion of the testimony that the use of a red pen by Woods was, "some kind of a statement by him." Page 64. She returned to the subject of the red pen again at page 68 where she added that she had an impression -- impression is her word -- that her rejection -- rejection is also her word -- of Woods had influenced the relationship. There is no substance at all to that aspect of the Title Seven allegations that might also conceivably have been cited in support of the claim the merit system was really a pretext. The evidence about the incident in 1993 involving Buttling was considerably stronger, specifically the evidence that before Lopez was hired into this section Buttling made a comment in substance that white professional males are becoming extinct. This can be found on page 92, also on page 153 of the record, the diary entry Exhibit 35 A in evidence memorializes it, which is read at page 1995 of the record. Also, shortly after Lopez was hired -- the statement I just described was made before he was hired -- shortly after he was hired Buttling made another comment to the effect that he had been encouraged to hire a woman but didn't, that Lopez' last name would make a good impression on Human Resources.

Now, there is no question that these 1993 statements by Buttling evidence an antipathy on his part to preferential treatment to minorities and women.

Then we have the June 1995 vulgar cartoon. As best I can tell from my careful review of the record, the cartoon was found in the mail box by the plaintiff on June 23rd. I believe that's a reference to page 171 of the transcript. There is no other way to describe this vulgar cartoon than repulsive, offensive. There is no question that the reason the trial was held in this case was because this vulgar cartoon was placed in the plaintiff's mailbox.

The mailbox was one of numerous open mailboxes in the risk management section of the Port Authority, access to which the evidence showed was available to 5 to 600 employees in this section. I am referring to pages 172, 218 of the record.

The vulgar cartoon. Though, on this trial record it is difficult, if not impossible, to attribute to Buttling or Woods or any person in particular, it is, nevertheless, a powerful piece of evidence. It post dates the merit increase, and as I'll get to in a moment, there is a lack of linkage between that cartoon and the decision to accord her a merit increase, but there is no question about it, the strongest aspect of the plaintiff's case is the appearance of that disgusting cartoon in her mailbox.

Lastly, there is this incident in August of 1995. It is really anomalous but also, an offensive event involving Woods. It began as what was intended to be a joke by Woods, even according to the plaintiff, regarding the plaintiff's writing ability. Woods joked to her -- one has to wonder why anyone would think this would be funny, but Woods joked to her as she was writing a report at her desk that she should write the report in Polish. This is that inappropriate comment which then evolved into a perplexing conversation that included, among other things, Ms. Ryduckowski pointing out that Joseph Conrad who was Polish born, Polish speaking

individual, became one of the greatest writers in our language -- see Lord Jim.

The reference to Joseph Conrad, which was intended by her to deflect in this inappropriate conversation, then evolved into a conversation about people fleeing Poland and this anomalous quite offensive statement by Woods that all Polish people are instigators.

I believe I have not left anything out.

That accurately describes the evidence of anti-Polish, anti-women animus in the Port Authority workplace. There is no connection between those events which are separated in several instances by years and the decision to award the merit increases. The undisputed testimony is that the decision on the merit increases was made by Rao -- page 293 of the trial transcript -- -- I conclude that the challenged decision is not linked in any way to the untoward conduct that I have described, and I conclude that no reasonable fact finder could find otherwise.

That is a long-winded way of addressing an issue that was not presented by the plaintiff and that is, the issue of whether or not, even assuming the merit system were validly in place, that in this case it was merely a pretext for discrimination against the plaintiff. Again, that issue was not presented to the jury, but if it were the jury could not reasonably have resolved it in favor of the plaintiff.

So, for those reasons I am granting the motion under Rule 50. I am setting aside the jury's verdict in favor of the plaintiff on the 1995 Equal Pay Act claim.

If I have done so erroneously the circuit court will let us know. I will then calculate the damages we will pay to which

the plaintiff will be entitled if she prevails. That is not one we need the jury's help on. I will resolve that if the Circuit concludes that I have improperly set aside the jury's verdict.

Have I left anything out that I have should have addressed in your judgment, Mr. Melis or yours, Ms. Lee?

MR. MELIS: If I could just mention the question that presented to the jury was whether a valid merit system was in place at the Port Authority and your finding together with your holding would be that, although there is a consistency to the question of whether there was a systematic application of certain increases to rates, that if the plaintiff received a higher rating, that there was some discretion that was not necessarily indicated. It is the inconsistency of either the merit system is applied rigidly or the discretion and by your recognizing the discretion, in that case would invalidate the merit system because there would be too much discretion and as to what they purport to be a merit system in this two-page document. It is just a general outlay. It doesn't say what increase would be applied for certain ratings. It says performance in the main factor, essentially. It doesn't say how much of a raise increase you could expect for certain performance ratings. That would be your holding, that inconsistencies wouldn't validate the merit system?

THE COURT: Well, I am not sure what your question is. You have my holding. I have concluded as a matter of law that no rational juror could fail to find that the Port Authority sustained its burden of proving the valid merit system. I understand you have your arguments regarding what you consider to be inconsistencies, but in Chanfrau's testimony, frankly, I don't see those inconsistencies the way you do, but on the other hand, I don't mean to deprive you of the opportunity to make those arguments to the Court of Appeals.

Those are at bottom subsidiary questions within my overall determination that the defendants are entitled to judgments as a matter of law on the claim.

Judgment of the United States District Court for the Eastern District of New York Dated March 31, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DANUTA RYDUCHOWSKI,
Plaintiff,
- against -
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY
Defendant.

JUDGMENT
96-CV-5589 (JG)

An Order of the Honorable John Gleeson, United States District Judge, having been filed on March 30, 1999; entering judgment for the defendant on the Title VII claim and on the 1994 Equal Pay Act claim pursuant to the jury's verdict of December 2, 1998; and, also entering judgment for the defendant on the 199 Equal Pay Act claim pursuant to the oral decision of February 19, 1999 granting the defendant's Fed. R. Civ. P. 50(b) motion; it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendant; that judgment is entered for the defendant on the title VII claim and on the 1994 Equal Pay Act claim pursuant to the jury's verdict of December 2, 1998; and, that judgment is also entered for the defendant on the 1995 Equal Pay Act claim pursuant to the oral decision on February 19, 1999 granting the defendant's Rule 50(b) motion.

Dated: Brooklyn, New York
March 31, 1999

ROBERT C. HEINEMANN
Clerk of the Court

By: /s/
JAMES GIOKAS
Chief Deputy Clerk of Court

APPENDIX B

Decision of the United States Court of Appeals for the Second Circuit Dated February 8, 2000

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: October 19, 1999 Decided: February 8, 2000)

Docket No. 99-7397

DANUTA RYDUCHOWSKI,

Plaintiff-Appellant,

—v.—

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant-Appellee.

Before:

KEARSE, MINER, and LEVAL,

Circuit Judges.

Appeal from a judgment as a matter of law entered in the United States District Court for the Eastern District of New York (Gleeson, *J.*) setting aside a jury verdict in favor of plaintiff in an action brought under the Equal Pay Act, the court having found no basis for the jury's determination that

the pay differential between the female plaintiff and a similarly situated male colleague was not the result of a valid merit system.

Reversed and remanded.

THOMAS F. BELLO, Staten Island, NY (Demetrios G. Melis, of counsel), *for Plaintiff-Appellant.*

ANNE M. TANNENBAUM, New York, NY (Milton H. Pachter, Arthur P. Berg, & Megan Lee, New York, NY, on the brief), *for Defendant-Appellee.*

MINER, *Circuit Judge*:

Plaintiff-Appellant Danuta Ryduchowski ("Ryduchowski") appeals from a judgment as a matter of law entered in the United States District Court for the Eastern District of New York (Gleeson, *J.*) setting aside a jury verdict in her favor on a claim asserted under the provisions of the Equal Pay Act of 1963 ("EPA"), 29 U.S.C. §§ 206(d), 215(a)(2). The court found no basis for the jury's determination that Ryduchowski's former employer, defendant-appellee The Port Authority of New York and New Jersey ("Port Authority"), had not established a valid merit system defense. Three claims were tried to the jury: (1) a Title VII claim based on alleged unlawful failure to promote in 1995, *see* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; (2) an EPA claim based on Ryduchowski's 1994 pay increase; and (3) an EPA claim with regard to Ryduchowski's 1995 pay increase. The EPA claims alleged that Ryduchowski received imper-

missibly lower pay increases in 1994 and 1995 than a male counterpart. The jury's verdict was favorable to the Port Authority with respect to all of Ryduchowski's claims except the 1995 EPA claim, the jury having determined by a special finding that the Port Authority did not establish its affirmative defense of a valid merit system. Thereafter, the Port Authority moved for judgment as a matter of law. The district court granted the motion, finding that although Ryduchowski and her co-worker, Jeffrey Lopez ("Lopez"), were similarly situated, they had received justifiably different performance evaluations pursuant to a valid merit system, which explained the differences in their 1995 salary increases.

For the reasons that follow, we reverse the judgment of the district court and reinstate the jury verdict. We remand to the district court so it may assess plaintiff's damages.

BACKGROUND

The States of New York and New Jersey created the Port Authority by compact in 1921. Its purpose is to develop public transportation, terminal, and other facilities of commerce within the statutorily defined Port District that spans the two states. The Port Authority currently owns and/or operates thirty-three facilities within the Port District.

Ryduchowski is a woman of Polish origin who has a Masters of Science and a Ph.D. in Civil Engineering from the University of Warsaw. During the twenty years following her educational training, she gained practical experience and eventually became a licensed engineer in both New York and New Jersey. Between 1988 and 1995, she worked for the Port Authority as an engineer. In September 1995, plaintiff was terminated from her position with the Port Authority.

On November 14, 1996, Ryduchowski brought this action against the Port Authority. She alleged that the Port Authority had discriminated against her on the basis of her gender and national origin. She claimed that, while working at the Port Authority, she was subjected to insults, jokes, and harassment related to her gender and national origin. She asserted that as a result of this discrimination, the Port Authority failed to promote her and terminated her employment in violation of Title VII, and paid her less than a similarly situated male colleague in violation of the EPA.

The district court granted partial summary judgment to the Port Authority on November 19, 1998, rejecting every aspect of Ryduchowski's Title VII claim except the challenge to Lopez' 1995 promotion. With respect to Ryduchowski's EPA claims, the court granted summary judgment dismissing the 1993 EPA claim, but denied summary judgment as to the 1994 and 1995 EPA claims.

The Trial

On November 30, December 1, and December 2, 1998, the remaining claims were tried to a jury: (1) the Title VII failure to promote claim; (2) the 1994 EPA claim; and (3) the 1995 EPA claim. Ryduchowski prevailed solely upon the 1995 EPA claim. The evidence with respect to that claim, which we take in the light most favorable to Ryduchowski, focused on two principal issues: (1) Ryduchowski's job skills and performance evaluations and (2) the Port Authority's compensation system.

A. The Evidence

(1) Ryduchowski's Job Skills & Performance Evaluations

Ryduchowski testified that when she was hired as an engineer in the Engineering Audit Division at the Port Authority,

she was the only female of the approximately twenty engineers in the Division. Her duties required her to perform structural evaluations of various Port Authority bridges and buildings. She reviewed drawings and specifications, performed final inspections at construction sites, and drafted reports of her findings on any given project for submission to a senior engineer, who was responsible for a final report. During her first year, no one at the Port Authority complained about her written reports or her communications skills. In fact, she received a letter from her Manager, Mr. Rao ("Rao"), indicating that he and Mr. Buttling ("Buttling"), her supervisor,[1] were most pleased with her performance.

At the close of her second year of employment, in the summer of 1990, Ryduchowski received a more formal performance evaluation consisting of an evaluation sheet with multiple sections and corresponding ratings for each section. She also received in her yearly salary a merit increase that was tied to her overall rating on this evaluation. Her 1990 performance evaluation indicated that her reports were understandable and contained good thoughts, "but require[d] some editing and rewriting." With regard to this comment on her evaluation, Ryduchowski testified that she believed it was acceptable to submit draft reports that required editing and rewriting because sometimes the reports had to be prepared within a very short time frame. This view was supported by Rao, who testified that it was acceptable for a staff engineer's reports to require a little editing and rewriting. Ryduchowski's overall rating on the 1990 evaluation was "[c]ompetent and dependable level of performance," the third highest rating out of six.

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[1] Rao's position as Manager was senior to Buttling's as Supervisor.

During 1990, Ryduchowski's Division was moved from the Treasury Department to the Risk Management Division, resulting in the loss of its responsibility for plan reviews and final inspections. According to Rao, this affected Ryduchowski's work by placing an increased emphasis on writing.

During the 1991 evaluation period, Ryduchowski worked very closely with the senior engineer on her projects, Mr. Woods ("Woods"). During this time, Woods and Ryduchowski became very friendly. However, after Woods commented to her that the moments they spent together were the happiest of his life, Ryduchowski became concerned that Woods was interested in pursuing a romantic rather than professional relationship, and sought to "withdraw" from the situation.

When Ryduchowski received her evaluation for 1991, she had been marked lower in the Oral Expression category, from "understandable" and "organized" to "lacks clarity and conciseness." Likewise in the "Initiative/Dependability" category, she received a lower rating than she had in the 1990 evaluation. Most importantly, her overall rating had fallen in the 1991 evaluation to "acceptable," in contrast to her prior rating of "[c]ompetent and dependable."

"[S]hocked and surprised" by this "sudden change in [her] performance evaluation," Ryduchowski complained to her supervisor, Buttling. Buttling submitted her complaints to Rao, who then met with Ryduchowski. Ryduchowski told Rao that she felt she had been marked lower because of comments from Woods, who harbored ill will towards her because of a "personal situation." She also told Rao that she felt she was being discriminated against on the basis of her gender and national origin, which had resulted in her not being given an opportunity to perform independent engi-

neering evaluations. According to Ryduchowski, Rao told her that the evaluation would be upgraded and that she "should forget about th[e] situation."

After Ryduchowski's meeting with Rao, her 1991 overall rating was restored to the 1990 rating of "[c]ompetent and dependable." Rao testified that he changed her rating because an engineer's performance rating should not be lowered unless a supervisor had first spoken to the engineer and previously had made a written record of his concerns. He further explained that it was his practice to ask his supervisors to put written comments regarding an employee in the employee's personal file, so he could use them for future reference. The Port Authority never produced any written comments regarding Ryduchowski's performance apart from her performance evaluations.

Ryduchowski indicated that during the 1991-92 and 1992-93 evaluation years, as a result of her rejection of Woods, he excessively edited her reports, failed to give her enough time to complete her reports, and made inappropriate comments regarding her writing skills. Woods confirmed that in an effort to speed up the report process, he had asked Ryduchowski to prepare draft reports and told her "not to worry about how she wrote [them]." In this period, Ryduchowski heard Buttling say, on more than one occasion, that "white professional males" were becoming an "extinct species" because of preferential treatment for women and minorities. She also testified that she was afraid to complain about these statements. During both of these years, Ryduchowski again received overall performance ratings of "[c]ompetent and dependable."

In 1993, when Lopez was hired, Buttling commented to Ryduchowski that Lopez' last name was very important because he did not want to hire another woman, but by hiring Lopez, whose name indicated that he was a minority, he

could nevertheless make a good impression on the Human Resources Division. When he was hired, Lopez' educational background consisted of undergraduate degrees in architecture and civil engineering but, unlike Ryduchowski, no graduate work. Lopez assumed a staff engineer position and duties comparable to those of Ryduchowski.

Around this time, Ryduchowski became the first engineer in her Division to work with a new computer system. As a result, Rao asked her to present a lecture on the new system to the entire Division. According to Ryduchowski, several of her colleagues congratulated her on the speech. At the close of the 1994 evaluation year, covering the period July 1993-94, Ryduchowski again received an overall performance rating of "[c]ompetent and dependable." She also received a notice stating that her salary would be increased by 3.5%. During this time period, Lopez and Ryduchowski performed similar duties. Nevertheless, Lopez received an overall performance rating of "exceeds most position requirements," the second highest mark out of six, and a salary increase of 4.7%.

During the 1995 evaluation period, the senior engineer position became available because of Buttling's retirement and Woods' promotion to Supervisor. Despite Ryduchowski's interest in the position, it was never publicly listed, nor was she given the opportunity to apply for the position. Instead, Lopez was selected for the position. Around this time, Ryduchowski overheard Woods telling Buttling not to give her a good performance rating because after Buttling left, Woods would "still [have to] deal with her, so [he could] run into some kind of problem[ ] if [Ryduchowski] has [sic] good performance."

After becoming the Supervisor, Woods made several negative comments to Ryduchowski concerning her Polish origin. Apparently, Woods came into Ryduchowski's work

cubicle and told her that she should write her reports in Polish because her English was so poor. After making some comments regarding Jewish people that Ryduchowski found offensive, he also stated that all Polish people were "instigators." Ryduchowski felt that she could not respond to these offensive comments because he was her Supervisor and if she "start[ed] a fight with him, it would be over, [her] performance would be downgraded, and [she] would be terminated." Additionally, in the summer of 1995, Ryduchowski received a vulgar cartoon in her work mailbox regarding a "Polish Shower." Rao, Buttling, and Woods all admitted seeing the cartoon before, but asserted that it had previously not contained the caption "Polish Shower." Buttling testified that he enjoyed those types of cartoons, but that he did not show this cartoon to Ryduchowski because it was not the type of thing "that you would show to a woman."

Ryduchowski's performance evaluation for 1995 once again rated her performance as "[c]ompetent and dependable." Thereafter she received a notice stating that her salary would be increased by 3.6%. For the same time period, Lopez received an overall performance evaluation of "exceeds most position requirements," and a merit pay increase of 4.4%.

(2) The Port Authority's Compensation System

According to the testimony of Mr. Chanfrau ("Chanfrau"), Assistant Treasurer and General Manager of the Risk Management Division, each division at the Port Authority was permitted to award merit increases in 1994 and 1995; the amounts could total up to 3.5% and 3.2% of the division's aggregate salary for 1994 and 1995 respectively. Accordingly, the average merit increase granted to each employee was equal in those years to the overall merit increase percentage authorized, with the "better" employees receiving

merit increases in excess of the average and other employees receiving merit increases below the average.

Since Ryduchowski was paid at grade B-92, she was covered by an internal policy relating to merit increases for employees in pay plan "B." The policy establishing the standards governing the merit increase program was contained in a written document. This document was the only one introduced in evidence that pertained to the program and provided, *inter alia*, as follows:

> Merit increases should be based primarily on performance, with consideration also given to the employee's position in his/her salary range and attendance record. These increases are not automatic and all directors should review the job performance, attendance record and the present salary of each staff member to determine if the employee[']s contribution warrants an increase. . . .
>
> . . . Prior to an employee's merit review date, the supervisor reviews the employee's performance via the Performance Planning and Review process and completes the necessary forms, and the Merit Increase Recommendation. Both are then forwarded to the department's administrative section to certify that the PP&R forms are completed and filed in each department.
>
> . . . The department's administrative section summarizes all merit increase recommendations. . . .
>
> . . . After review by the Employment Division for verification and accuracy the HR Director submits the appropriate recommendations to the AED/Administration, who in turn reviews [them] with the Executive Director for approval.

Chanfrau asserted at trial that Port Authority managers and supervisors were restricted in awarding merit pay increases that were out of line with an employee's performance rating. Based on Ryduchowski's overall rating of "[c]ompetent and dependable" and the overall Port Authority merit increase that year of 3.2%, Chanfrau contended that Ryduchowski should have received a merit pay increase in 1995 between 3 and 3.5%. Chanfrau also described a chart that indicated the appropriate range of merit pay increases for employees according to their performance rating. However, this chart was never produced at trial.

B. The Verdict

The case was submitted to the jury via a special verdict sheet. The jury found for the Port Authority with respect to the Title VII claim. With regard to both the 1994 and 1995 EPA claims, the jury made specific findings that Ryduchowski and Lopez performed equal work under similar working conditions and that the Port Authority had not succeeded in establishing, by a preponderance of the evidence, its affirmative defense that Ryduchowski's lower merit increase was the result of "a valid merit system." However, the 1994 EPA claim had not been brought within the two year statute of limitations and thus required proof of a willful violation of the EPA. *See* 29 U.S.C. § 255(a). Since the jury did not find that the 1994 pay differential was willful, the jury's finding was favorable to Ryduchowski solely on the 1995 EPA claim. The jury was not asked to determine Ryduchowski's damages because the trial court instructed the jury that if its findings were favorable to Ryduchowski, then the court would determine her damages. Neither party objected to this instruction.[2]

[2] In fact, the parties agreed to eliminate any instruction on damages under the Equal Pay Act from the jury charge.

The District Court's Entry of Judgment as a Matter of Law

Following the jury's verdict, the Port Authority filed a motion for judgment as a matter of law. On February 19, 1999, the district court granted the motion and set aside the jury's verdict. Acknowledging that it had "struggled with th[e] motion," the court found that it was "not in dispute . . . , nor could it reasonably be" that Ryduchowski and Lopez performed equal work under similar circumstances during 1994 and 1995. The court then concluded that, "[e]ven viewing the evidence . . . in the light most favorable to the plaintiff," the difference in the 1995 performance evaluations of Lopez and Ryduchowski was "plainly justified" because of Ryduchowski's difficulties with written and oral expression. It pointed out that Ryduchowski's argument, both to the jury and to the court at summary judgment, was that she should have received a larger increase because there may have been more money available in the division for pay increases. Finding this issue inapposite, the court stated that there was nothing in the record indicating that "the plaintiff should . . . have gotten more than a 3.5% increase in 1995 based on her performance evaluation."

With regard to the merit system, the court held that "the only rational conclusion to be made on th[e] evidence [was] that the very modest difference, point eight percent, between the merit increases of plaintiff and Lopez in 1995 w[as] based on a valid merit system." Finding that "the case was tried on the issue of whether the Port Authority satisfied its burden of justifying the different merit increases by reference to a legitimate . . . merit system," the court concluded that the Port Authority had met its burden. In particular, the court found no connection between the allegations of "anti-women animus" at the Port Authority and the award of merit increases. Noting that Ryduchowski had not argued that the Port Authority's merit system was a pretext for unlawful dis-

crimination, the court found that in any event the evidence did not support such a determination. This appeal followed.

DISCUSSION

In this circuit it is well established that a trial court may only grant a motion for judgment as a matter of law if "there is such a complete absence of evidence supporting the verdict that the jury's finding could only have been the result of sheer surmise and conjecture, or if the evidence is so overwhelming that reasonable and fair minded persons could only have reached the opposite result." *Lambert v. Genesee Hosp.*, 10 F.3d 46, 56 (2d Cir. 1993) (internal quotations and alterations omitted). *See also* Fed. R. Civ. P. 50(a) (judgment as a matter of law is only appropriate if "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the non-moving] party"). In reviewing the district court's decision to set aside the jury's verdict and issue judgment as a matter of law, we must view the evidence in the light most favorable to Ryduchowski, the prevailing party before the jury. *See Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 161 (2d Cir. 1998); *Logan v. Bennington College Corp.*, 72 F.3d 1017, 1022 (2d Cir. 1996). Applying these precepts to the case at hand, we are of the opinion that the district court erred in setting aside the jury's verdict.

The EPA's General Principles

"The Equal Pay Act, passed by Congress in 1963, prohibits employers from discriminating among employees on the basis of sex by paying higher wages to employees of the opposite sex for 'equal work . . .' " *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999) (quoting 29 U.S.C. § 206(d)(1)). "The purpose behind the enactment of the EPA was to legislate out of existence a long-held, but outmoded societal view that a man should be paid more than a woman

for the same work." *Id.*; *see also Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). To establish a prima facie violation of the EPA, a plaintiff must demonstrate that "i) the employer pays different wages to employees of the opposite sex; ii) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and iii) the jobs are performed under similar working conditions." *Belfi*, 191 F.3d at 135 (internal quotation omitted); *see also* 29 U.S.C. § 206(d)(1); *Corning Glass Works*, 417 U.S. at 195. However, unlike Title VII, the EPA does not require a plaintiff to establish an employer's discriminatory intent. *See* 191 F.3d at 135-36; *Strecker v. Grand Forks County Soc. Serv. Bd.*, 640 F.2d 96, 99 n.1 (8th Cir. 1980) ("The [EPA] creates a type of strict liability; no intent to discriminate need be shown."), *implicitly overruled on other grounds by Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

Instead, the EPA makes it illegal for an employer to pay unequal compensation to those of different genders for equal work, "except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1). Once the employer proves that the wage disparity is justified by one of the EPA's four affirmative defenses, "the plaintiff may counter the employer's affirmative defense by producing evidence that the reasons the defendant seeks to advance are actually a pretext for sex discrimination." *Belfi*, 191 F.3d at 136 (citing *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992)).

Despite the statute's reference to a merit system, and a defendant's need to establish its valid implementation as a defense to a prima facie violation of the EPA, "what constitutes a merit system, may not be so obvious." *EEOC v.*

Aetna Ins. Co., 616 F.2d 719, 725 (4th Cir. 1980). Although our circuit has apparently never addressed the proper contours of the EPA's merit system defense and the caselaw outside our circuit is sparse, we are not without some guidance in our evaluation. Some of our sister circuits have established the rule that "a merit system must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria." *Aetna Ins. Co.*, 616 F.2d at 725 (internal quotation marks omitted). *See also Maxwell v. City of Tucson*, 803 F.2d 444, 447 (9th Cir. 1986) (quoting *Aetna Ins. Co.*); *Ottaviani v. SUNY at New Paltz*, 679 F. Supp. 288, 337 (S.D.N.Y. 1988). Moreover, employees must be aware of the merit system and the merit system must not be gender based. *See Aetna Ins. Co.*, 616 F.2d at 725. The burden of establishing one of the four affirmative defenses is "a heavy one," *Timmer v. Michigan Dep't. of Commerce*, 104 F.3d 833, 843 (6th Cir. 1997), because the statutory exemptions are "narrowly construed." *Aetna Ins. Co.*, 616 F.2d at 724 (citing *Hodgson v. Colonnades, Inc.*, 472 F.2d 42, 47 (5th Cir. 1973)). We adopt these criteria in our analysis of Ryduchowski's claims.

Analysis

Here, it is uncontested that Ryduchowski established the prima facie elements of her claim. *See Ryduchowski v. Port Authority of New York & New Jersey*, No. 96-5589, 1998 WL 812633, at *12 (E.D.N.Y. Nov. 19, 1998) ("No dispute exists that (1) the Port Authority paid different wages to Lopez and plaintiff . . . ; (2) Lopez and plaintiff performed equal work on jobs requiring equal skill, effort, and responsibility . . . ; and (3) Lopez and plaintiff performed their jobs under equal working conditions."); Special Verdict, Sec. 3(a). The Port Authority's arguments to this court have failed to dispute any of the findings of the jury and the district court in

this regard. Instead, the crux of this case is our assessment of whether the jury lacked an evidentiary basis for determining that the Port Authority failed to establish its affirmative defense of a valid merit pay system.

We conclude that the verdict was supported by the evidence at trial. The Port Authority had the heavy burden of establishing "an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria." This heavy burden extended not only to establishing that the Port Authority formulated an organized and structured system based on predetermined criteria, but also to proving that it *systematically* administered its plans for a merit system. Our review of the record compels the conclusion that there was ample evidence that the Port Authority failed to meet this burden. Even assuming that the compensation system was organized, structured, and based on predetermined criteria, it is clear that the jury could have reasonably concluded that Port Authority employees were not evaluated systematically. Without systematic evaluation, a *valid* merit system cannot be said to exist.

Based on the evidence submitted at trial, the jury could have found that the Port Authority failed, contrary to its written policy, to take into account employees' attendance records and positions within salary grade in determining merit increases. Although the lone document submitted at trial as to the administration of the Port Authority's merit system stated that these factors should be considered, *see supra* at pages 1159-60, there was no evidence that these factors were actually considered. The yearly evaluation form, which contained numerous evaluation categories,[3] certainly

[3] These categories included the following: written communication, oral expression, initiative/dependability, interpersonal relationships, problem analysis/decision making, planning and organization, stress tolerance, leadership, management control/delegation, and decisiveness. The policy state-

contained no category for attendance or place within salary grade.

The jury could also have concluded that the Port Authority failed to properly correlate merit increases to an employee's evaluation. Chanfrau testified that, based on Ryduchowski's 1995 evaluation, her merit increase should have been between 3 and 3.5%, but the jury could have reasonably concluded, in light of her receipt of a merit increase in 1995 outside this range, that this policy was not validly implemented.[4] Additionally, the Port Authority never produced the chart that supposedly specified the appropriate merit increase range for each performance evaluation rating.

Furthermore, the jury could have concluded that the Port Authority's detailed evaluation procedures were not systematically applied to all employees because of the gender prejudice of Ryduchowski's superiors, as seen in the actions and words of Buttling and Woods. The jury heard evidence that Woods attempted to negatively influence Buttling's evaluation of Ryduchowski in 1995. The jury also heard ample evidence that Buttling resented women in the workplace. Moreover, the jury heard evidence of how Rao altered Ryduchowski's 1991 evaluation in response to her concerns. The jury could have concluded that Ryduchowski's supervisors manipulated the evaluation process according to their personal whims and prejudices, and thereby prevented the merit system from being systematically applied.

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ment concerning the administration of the merit system was not part of this form.

[4] Although her merit increase in 1995 was only .01% outside of the appropriate range, and in fact beneficial to Ryduchowski, the jury was entitled to take this disparity into account in considering the adequacy of the Port Authority's proof of a valid merit system.

The district court failed to recognize that, based on the evidence at trial, the jury could have reached the above conclusions in evaluating the Port Authority's merit system defense. Instead, the district court's judgment primarily relied upon Ryduchowski's allegedly inferior written and oral communications skills. While there was evidence that Ryduchowski's skills in these areas were subpar, the district court failed to appreciate that it was the jury's prerogative to discount or even to disbelieve this evidence. The jury heard that year after year Ryduchowski received an overall rating of "[c]ompetent and dependable."[5] Although the Port Authority proffered the explanation that Ryduchowski's duties changed over time, rendering her communications skills inadequate, the jury was entitled to find this argument unconvincing. Having rejected the proffered explanation, the jury could have reasonably concluded that Ryduchowski's lower performance evaluation in 1995, which led to her lower merit increase, was not the result of differences in performance, but rather differences in gender between her and Lopez.

The arguments raised by the Port Authority in support of its contention that the jury acted unreasonably are fourfold. The Port Authority contends that: (1) the .8% differential in the 1995 merit increases of Lopez and Ryduchowski was justified by their differences in performance; (2) the plaintiff was satisfied with her evaluations; (3) the alleged acts of discrimination were unrelated to the administration of the merit system; and (4) the plaintiff never asserted any claims of pretext. With respect to the first point, we have already shown that the jury had a basis for finding that the 1995 difference in the merit increases of Lopez and Ryduchowski was not justified by their differences in performance. Moreover, it

[5] During those years, excluding the 1991 evaluation that was subsequently revised, she was consistently rated "clear" and "convincing" in oral expression and four out of six years "understandable " and "organized" in written expression.

was the Port Authority's burden to convince the jurors that it employed a valid merit system. It simply failed to meet this burden.

Second, we find no merit in the Port Authority's contention that Ryduchowski's supposed satisfaction with her performance ratings somehow conflicts with the jury's verdict. Even if the evidence showed that Ryduchowski was satisfied with her evaluations at the time, a proposition on which we express no view, the EPA contains no provision requiring a plaintiff to contemporaneously complain to her supervisors about her evaluation and unequal pay. Rather, it is sufficient for a plaintiff to timely assert her claim, present her complaints before the jury, and let the judicial system remedy any injustice. Here, Ryduchowski followed those procedures and obtained a verdict in her favor. The Port Authority was free to argue at trial, as it did, that Ryduchowski's alleged satisfaction with her evaluation showed the existence of a valid merit system. Yet the jury also was free to, and apparently did, reject this contention.

Third, as discussed above, there was sufficient evidence for the jury to conclude that gender-based discrimination affected Ryduchowski's performance evaluations and her merit increases. Fourth, the Port Authority's reliance on the district court's finding that plaintiff failed to allege pretext is misplaced. While Ryduchowski's evidence might have supported a finding of pretext, the jury did not have to reach the pretext issue, because it concluded that the Port Authority had failed to show the existence of a *valid* merit system. In considering this issue, the jury was entitled to take into account the demonstrated irregularities in the administration of the compensation system and the biases of the particular actors involved.

It therefore seems to us that the jury's verdict was not the "result of sheer surmise and conjecture," but instead a rational conclusion based on the evidence presented at trial. As the foregoing illustrates, the jury could have concluded that the Port Authority's merit system, while admittedly detailed, was not applied systematically, rendering a facially adequate merit system invalid as applied to Ryduchowski. While reasonable minds might disagree with the jury's verdict, it was not for the district court to substitute its judgment for that of the jury, absent circumstances indicating that the jury's verdict was without foundation. It was the Port Authority's burden to convince the jurors that it applied a valid merit system. The jury's verdict reveals that the Port Authority simply failed to meet this burden.

For the reasons discussed above, we hold that the jury's verdict was supported by the record and should be reinstated.

CONCLUSION

In accordance with the foregoing, we reverse the judgment of the district court, reinstating the jury's verdict in favor of the plaintiff. We also remand to the district court so it may assess the appropriate measure of damages due the plaintiff.

Order and Judgment of the United States Court of Appeals for the Second Circuit Dated February 8, 2000

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 8th day of February, two thousand.

BEFORE: Hon. Amalya L. Kearse
Hon. Roger J. Miner
Hon. Pierre N. Leval

Circuit Judges

Docket No. 99-7397

DANUTA RYDUCHOWSKI,
Plaintiff-Appellant,

- v. -

THE PORT AUTHORITY OF
NEW YORK AND NEW JERSEY
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the judgment of said district court be and it hereby is reversed and remanded to said district court for further proceedings in accordance with the opinion of this court.

FOR THE COURT
Karen Greve Milton, Acting Clerk
By:
/s/
Beth J. Meador
Administrative Attorney